Table of Contents.

Opinion below	1
Jurisdiction	1
Question presented	2
Statement of the case	2
Argument	6
Conclusion	9

Table of Authorities Cited.

Cases.

Crowe v. Di Manno, 225 F. 2d 652	7
Franano v. United States, 310 F. 2d 533	7
MacKnight v. United States, 263 F. 832; cert. den. 253 U.S. 493	7
National Dairy Products Corporation v. United States, 350 F. 2d 321	7
One Buick Automobile v. United States, 275 F. 809	8
Quercia v. United States, 289 U.S. 466	7, 8
United States v. Murdock, 290 U.S. 389	8

Statute, Etc.

28 U.S.C. § 1254 (1)	1
Rules of the U.S. Supreme Court, Rule 19	6

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1179.

CHARLES A. WRIGHT, INC.,
Petitioner,
v.
F. D. RICH CO., INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals (R. 173-180) is reported at 354 F. 2d 710.

Jurisdiction.

The judgment of the Court of Appeals (R. 81) was entered on January 5, 1966. A timely petition for rehearing, filed on February 18, 1966, was denied on March 1, 1966 (R. 189). The petition for writ of certiorari was filed on April 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented.

Whether a Federal District Court judge committed prejudicial error in expressing his opinion upon the evidence even though he stated several times in his charge to the jury that the facts are to be determined solely by the jury, whose decision on the facts would be final.

Statement of the Case.

On June 10, 1960, the petitioner (plaintiff) instituted a suit in the United States District Court for the District of Massachusetts against the respondent (defendant) to recover damages for the alleged breach by the defendant of eleven contracts between the parties (R.A. 2). Jurisdiction in the District Court was based on diversity of the parties, the petitioner being a Massachusetts corporation and the respondent a Connecticut corporation.

The facts stated by the Court of Appeals (Appendix, pp. 17-19) are undisputed here (see Petition, "Question Presented," p. 2) and set forth clearly and adequately the underlying background of this case.

Briefly these facts were:

Between February and October of 1954 the plaintiff and the defendant entered into a series of eleven contracts wherein the plaintiff, as a subcontractor, was to perform certain excavation and concrete work for the defendant, which was the general contractor on a project to construct certain facilities for the United States Government at Westover Air Force Base and Hanscom Air Force Base (R.A. 7-8, 27).

During the course of the work the plaintiff's suppliers began to complain of non-payment, and, in November of 1954, the plaintiff informed the defendant that, as of October 31, 1954, the plaintiff was indebted to suppliers in the

amount of $117,000 and that, under its contract with the United States, the defendant would be liable for the non-payment of suppliers by the plaintiff. As a result, the defendant stopped making the monthly progress payments which were required by the terms of the contract.

Thereafter both parties conferred and a supplementary agreement was entered into. As part of the agreement the plaintiff gave the defendant a promissory note for $50,000, secured by a chattel mortgage on machinery and equipment. The agreement contained an acknowledgment by the plaintiff to the effect that it had not been performing the work in accordance with the terms of the subcontracts and that it was behind in the progress of the jobs.

Subsequently the plaintiff continued to make substantial payments to the plaintiff's creditors and to pay the plaintiff's payroll costs, but did not make monthly progress payments. The defendant continued to complain about the plaintiff's lack of progress, and in March, after receiving notice that the plaintiff's insurance was cancelled for non-payment of premiums, the defendant took over the work under the eleven contracts after notice to the plaintiff. In mid-April the plaintiff was allowed to resume a portion of the work as to certain of the eleven contracts. However, on June 15, 1955, the defendant finally terminated all further contracts with the plaintiff.

Thereafter the plaintiff's machinery and equipment were sold at a mortgagee's sale; and, in October 1955, the plaintiff was declared a bankrupt. The trustee in bankruptcy made no claim against the defendant on the subcontracts.

The plaintiff's suit, filed on June 10, 1960, five years after the events, sought damages for the defendant's alleged breach of the eleven contracts. The defendant denied any liability and counterclaimed for $304,943.01, being the cost to the defendant for completing the plaintiff's subcontracts above the subcontract prices (R.A. 14).

With the consent of the parties the matter was referred to a master, who found that the plaintiff had breached its contracts relating to performance and payment of creditors; that the defendant owed no moneys to the plaintiff; and that the defendant had no valid counterclaim against the plaintiff (Court of Appeals Opinion, Appendix, p. 20).

The master's report was introduced in evidence at the trial of the case to the jury (R.A. 15). The jury returned a verdict for the defendant on the plaintiff's complaint and a verdict for the plaintiff on the defendant's counterclaim (R.A. 81).

The District Court, Chief Judge Sweeney sitting, in charging the jury, stated, *inter alia* (R.A. 68-80):

> "The facts I will leave to you, with probably some comment, and your decision on the facts is final." (R.A. 68.)
>
> "Now you have heard this case, and it is now ended, or will be when you have brought in your verdict. Of course, your verdict will be in accordance with the evidence that you have heard here, plus the exhibits, which will be given to you, plus any logical inferences that are to be drawn from either the testimony or the exhibits.
>
> "The thing that will be most important to you is your own common sense, the same common sense that you use every day." (R.A. 69.)

Since one of the issues in the case involved the fact that the plaintiff had been a bankrupt and that the trustee in bankruptcy had abandoned any claim against the defendant, the trial Court explained the bankruptcy and the actions of the trustee (R.A. 74-75). The trial Court charged the jury that—

". . . The trustee in bankruptcy had a right to bring this action if he thought it was worth anything. And according to the court records he petitioned leave of the referee in bankruptcy to abandon this claim because he didn't consider it worthwhile, and the referee in bankruptcy allowed his petition and the claim was abandoned." (R.A. 75.)

The trial Court then instructed the jury on the law, stating:

"Well, Mr. Wright had a right to bring this suit. If he thought that it was worthwhile and that the trustee in bankruptcy and the referee had miscalculated the value of the suit, then the thing reverted to him . . . and it was something that he could prosecute himself if he wanted to." (R.A. 75.)

The trial Court also explained the function of the master before whom the matter had initially been heard with the consent of the parties (R.A. 76). The trial Court stated that, even though the master had rendered a report which was part of the evidence, the parties to the action, ". . . in the last analysis, . . . have a right to trial by jury, and that is what plaintiff is claiming" (R.A. 76). The Court then pointed out that the master's report was "prima facie evidence of the true status of the parties," and that his finding was that neither party was "entitled to recover" (*ibid.*).

Then the trial Court stated that—

"Well, the plaintiff has a right to show that even he was wrong. And his duty is still to convince you by the preponderance of the evidence that he has a right to recover, which means that the master was wrong." (R.A. 76.)

"And so, I think you ought to read this master's report. You have a right to reject it, because you are the last judges of the equities in this case. And while I seldom comment on the facts in the case, I think in this case that I will, and I think that the master's report indicates the proper status of the parties." (*Ibid.*)

The plaintiff appealed the decision to the Court of Appeals, alleging, *inter alia,* that comments by the trial judge in its instructions to the jury were prejudicial to the plaintiff. The Court of Appeals sustained the judgment of the District Court, holding that—

"The fairness of a charge cannot be determined by considering only a portion of it out of context. On appeal, the charge must be examined as a whole and portions of it will not be scrutinized apart from their content as isolated verbal phenomena. . . . [Citing case.] The trial judge in a federal court may express his opinion upon the evidence, provided he tells the jury that the determination of the facts rests entirely with them. . . . [Citing case.] This was done." (Court of Appeals Opinion, Appendix, p. 6.)

Argument.

The sole issue raised by the plaintiff in its petition is the fairness of the trial Court's charge to the jury. Such an issue will only in the most aggravated cases present this Court with the "special and important reasons" for exercising its discretion to review on a writ of certiorari a lower Court's determination (see Rule 19 of the Rules of this Court).

Clearly, the jurisdiction of this Court cannot be invoked by taking the words of a judge's charge out of context and

then parading them as an exhibit of horrors. This is precisely what the petitioner has attempted to do (see Petition, pp. 6-7). The quotes from the charge are fragmented, juxtaposed and edited so that the petitioner claims that the trial Court instructed the jury that "plaintiff should lose this case" (Petition, p. 7).

A reading of the entire charge makes it clear, as the Court below concluded, that the judge's comments on the evidence were tempered by his repeated reminders that the jurors were "the last judges of the equities of this case" (Court of Appeals Opinion, Appendix, p. 23).

It is well established that in the Federal Court a trial judge has the prerogative of commenting upon the evidence and expressing his opinions provided that such comments or expressions do not amount to what, in effect, would be an invasion of the province of the jury. This principle has been followed and reiterated by the various Appellate Courts, including the First Circuit. *MacKnight* v. *United States,* 263 Fed. 832, 839 (C.C.A. 1, 1920); cert. den. 253 U.S. 493. *Crowe* v. *Di Manno,* 225 F. 2d 652 (C.A. 1, 1955). *Franano* v. *United States,* 310 F. 2d 533, 537 (C.A. 8, 1962). *National Dairy Products Corporation* v. *United States,* 350 F. 2d 321, 333-334 (C.A. 8, 1965).

A federal trial judge is not a "mere moderator" of the facts, and can express his opinion if he does so "fairly, impartially and accurately," and makes it clear that his comments are only advisory and that all matters of fact "are for [the jury's] determination and theirs alone." *Crowe* v. *Di Manno,* 225 F. 2d 652, at 655. This is the rule of conduct long established by this Court. *Quercia* v. *United States,* 289 U.S. 466, 469.

Appellate Courts will not reverse or disturb a trial judge's comments unless those comments completely and wholly constitute an invasion of the jury's province.

In *Quercia* v. *United States, supra,* this Court ruled that the trial judge had in fact committed prejudicial error. An examination of that opinion reveals that the trial judge had not reviewed the testimony given by the defendant, who had taken the witness-stand, but merely referred to the defendant's testimony and had stated, as to the defendant, that "I think that every single word that man said, except when he agreed with the Government's testimony, was a lie." *Quercia* v. *United States, supra,* at p. 468.

In *United States* v. *Murdock,* 290 U.S. 389, 393, the defendant was indicted on a wilful refusal to give testimony and to supply information as to deductions claimed in his income-tax returns. After refusing the defendant's request to instruct the jury regarding the defendant's good-faith belief in refusing to answer, the Court stated:

> " '. . . The court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt.' "

In a decision involving the condemnation of an automobile, the Court advised the jury, after it had been out for some time and had come back for additional instructions, that in his opinion the government should prevail, but added that his opinion was merely advisory. The Court concluded that the trial judge in a Federal Court has the prerogative of commentary on the "weight of the evidence" if the jury is advised that the comments are only advisory, and found no error. *One Buick Automobile* v. *United States,* 275 F. 809, 811 (C.C.A. 8, 1921).

The petition here does not raise any question as to the propriety of the master's report itself, for this report was consented to by the plaintiff (see Court of Appeals Opin-

ion, Appendix, p. 23), and the petition raises no question as to its propriety or inclusion as evidence.

The sole question, then, is the propriety of the judge's comments, and it is submitted that those comments are well within the permissible range established by the decisions. While it is unnecessary, as the Court below stated, to "approve" of each of the judge's comments, nonetheless "substantial justice" was done (Court of Appeals Opinion, Appendix, p. 23).

Conclusion.

The decision of the Court of Appeals is clearly correct. There is neither a conflict of decisions nor a departure from the accepted and usual course of judicial proceedings such as to call for the exercise of this Court's supervisory powers. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,
JAMES L. ALLEN,
MOYNAHAN & NOVAK,
Counsel for Respondents.

Of Counsel:
LAWRENCE GOCHBERG,
733 Summer Street,
Stamford, Connecticut.